

STATE OF MICHIGAN
IN THE SUPREME COURT

TAMMY MCNEILL-MARKS,

Plaintiff/Appellee,

Supreme Court Case No. _____

Court of Appeals Case No. 326606

v

MIDMICHIGAN MEDICAL
CENTER – GRATIOT,

Gratiot County Circuit Court
Case No. 2014-11876-NZ

Hon. Randy L. Tahvonen

Defendant/Appellant.

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**DEFENDANT/APPELLANT MIDMICHIGAN MEDICAL CENTER – GRATIOT'S
APPLICATION FOR LEAVE TO APPEAL**

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INTRODUCTION AND STATEMENT OF GROUNDS FOR APPLICATION

This case raises a significant issue of first impression in Michigan: whether an employee's communication with his or her private attorney triggers whistleblower protection under Michigan's Whistleblowers' Protection Action, MCL 15.361 *et seq.* ("WPA"). The Court of Appeals' published opinion holds that it does. Specifically, the Court of Appeals holds that any communication to an attorney, by virtue of his or her membership in the State Bar of Michigan ("SBM"), constitutes "reporting" to a "public body."

The Court of Appeals' opinion is clearly erroneous and contrary to the language of the WPA. The SBM is not an "other body" under the WPA; it is a judicial agency. Even if it were an "other body," attorneys are not "members" of the SBM for purposes of the WPA. Moreover, no violation or suspected violation of law has been identified in this case, and confidential communications between attorneys and their clients do not constitute "report[ing]" under the act. For these reasons, because this case involves matters of jurisprudential significance, and because the Court of Appeals' opinion is inconsistent with other published opinions of the Court of Appeals, MidMichigan seeks leave to appeal to this Court.

If uncorrected, the Court of Appeals' opinion will have wide-ranging and unintended consequences for Michigan employers, who will now be exposed to an entirely new species of whistleblower liability never envisioned by the Legislature. The resulting uptick in WPA claims will doubtlessly impose significant costs on Michigan businesses. Accordingly, MidMichigan requests that this Court grant its application, reverse the Court of Appeals' opinion below, and reinstate the trial court's grant of summary disposition in favor of MidMichigan.

STATEMENT IDENTIFYING JUDGMENT

MidMichigan seeks leave to appeal the Court of Appeals' published opinion of June 16, 2016 in *Tammy McNeil-Marks v MidMichigan Medical Center – Gratiot*, Court of Appeals Docket No. 326606, attached as **Exhibit 1**.¹ That judgment reversed in part and affirmed in part the Gratiot County Circuit Court's grant of summary judgment to MidMichigan, **Exhibit 2**, and remanded the case for further proceedings.

¹ Based on an error in the parties' appellate papers, the Court of Appeals spells Plaintiff's name "McNeil-Marks." Here name is actually "McNeill-Marks."

STATEMENT OF QUESTIONS PRESENTED

(1) Whether an employee's communication with his or her private attorney constitutes "report[ing] . . . to a public body" under the Whistleblowers' Protection Act.

The Court of Appeals answers, yes.

The Circuit Court answers, no.

Defendant answers, no.

Plaintiff answers, yes.

(2) Whether Plaintiff had a basis to assert "a violation or a suspected violation of a law" under the Whistleblowers' Protection Act.

The Court of Appeals answers, yes.

The Circuit Court answers, no.

Defendant answers, no.

Plaintiff answers, yes.

STATEMENT OF FACTS AND PROCEEDINGS

The facts relevant to this application are not in dispute. McNeill-Marks is a registered nurse. **Exhibit 3**, Deposition of McNeill-Marks at 56:4-9. As of January 2014, MidMichigan employed her as a manager at its Alma, Michigan hospital. See *id.* at 59-60. At that time McNeill-Marks had an ex parte personal protection order (“PPO”) against Marcia Fields, who is the biological grandmother of McNeill-Marks’s three adopted children. *Id.* at 10-15. That PPO prohibited Fields from, among other things, stalking McNeill-Marks. **Exhibit 4**, Compl. at ¶ 7.

On January 13, 2014, McNeill-Marks saw Fields in the hospital. *Id.* at ¶ 8. Fields was being transported down a hallway in a wheelchair, and McNeill-Marks said “hello” to her. **Exhibit 3** at 102-105. Fields responded, “Hello, Tammy” “in one of those little voices she does” – “[a] little sing-songy voice she has when she feels she has passed something over on you like a little kid.” *Id.* at 103:7-9, 104:5-8. The interaction happened by chance, and there was no further interaction between McNeill-Marks and Fields at the hospital. *Id.* at 105:1-8.

McNeill-Marks called her private attorney, Richard Gay, and informed him that Fields was present at the hospital. **Exhibit 4** at ¶ 12; **Exhibit 3** at 113:6-20. Thereafter, Gay had Fields served with a copy of the PPO while she was still in the hospital. *Id.* at ¶ 15. Fields and her daughter complained to MidMichigan that McNeill-Marks had violated Fields’s privacy rights. See **Exhibit 3** at Dep. Ex. 22.

Because McNeill-Marks informed her attorney that Fields was at the hospital, MidMichigan terminated McNeill-Marks’s employment on February 14, 2014. *Id.* at ¶¶ 20-21. MidMichigan’s termination paperwork explained:

On 1/24/14 it was found at the conclusion of an investigation, that employee was in violation of policy 301.28 Corrective Action and Disciplinary Procedure & Rules of Conduct Group 2-#1 Violation

of patient/resident rights or confidentiality. This occurred on 1/13/14 when employee phoned her attorney and notified him that the respondent of a Personal Protection Order filed by the employee was a patient at the hospital. The patient recognized employee and they spoke in the hallway near [Operating Room] as the patient was transported to imaging. **Employee proceeded to call her attorney and notify him of patient's presence at the hospital.** The attorney office proceeded to serve patient with PPO later that night. The patient and daughter were distressed and filed a complaint which was investigated and proven to be consistent with breaching patient privacy. **For this severe breach of confidentiality and violations of HIPAA privacy/practices, employee is being discharged effective 2/14/14.** Employee was provided with a copy of policy 301.28 Corrective Action and Disciplinary Procedure & Rules of Conduct and policy 112.09 Access to Patient Information. [Exhibit 3 at Dep. Ex. 24, *sic* throughout, emphasis added.]

On March 3, 2014, McNeill-Marks filed this lawsuit against MidMichigan, alleging (1) retaliation in violation of the WPA and (2) retaliation in violation of Michigan public policy. **Exhibit 4.** At the close of discovery, MidMichigan moved for and was granted summary disposition. **Exhibit 2.** McNeill-Marks appealed.

In a 13-page published opinion, the Court of Appeals reversed. **Exhibit 1.** It concluded that Fields's conduct, "qualified as 'stalking' in violation of the PPO," but even if it did not, it qualified as a "*suspected* violation of the PPO." *Id.* at 10 (emphasis in original). The Court of Appeals further held:

[U]nder the plain language of the WPA, specifically MCL 15.361(d)(iv), **Gay qualified as a member of a "public body" for WPA purposes.** As a practicing attorney and member of the [SBM], Gay was a member of a body "created by" state authority, which, through the regulation of our Supreme Court, is also "primarily funded by or through" state authority. By holding otherwise, the trial court erred. . . .

[McNeill-Marks's] report to Gay was a report to a member of a public body, and therefore it was protected activity under the WPA [*Id.* at 12 (footnote omitted, emphasis added).]

The Court of Appeals further concluded that the trial court had correctly granted summary disposition as to McNeill-Marks's public policy claim because that claim was preempted by the WPA. *Id.* at 13.

MidMichigan now applies to this Court for leave to appeal.²

ARGUMENT

I. STANDARD OF REVIEW.

The trial court granted MidMichigan's motion for summary disposition under MCR 2.116(C)(10). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* at 120. The propriety of summary disposition is a question of law that this Court reviews de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006).

This case involves questions of statutory interpretation, which this Court also reviews de novo. *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 345; 871 NW2d 136 (2015).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT MCNEILL-MARKS'S CALL TO HER PRIVATE ATTORNEY CONSTITUTES "REPORT[ING] . . . A VIOLATION OR A SUSPECTED VIOLATION OF LAW . . . TO A PUBLIC BODY" UNDER THE WPA.

The WPA provides:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment **because the employee, or a person acting on behalf**

² MidMichigan's application is limited to the Court of Appeals' decision pertaining to the WPA. MidMichigan does not seek leave to appeal the Court of Appeals' decision with respect to its denial of McNeill-Marks's public policy claim, which the Court of Appeals decided correctly.

of the employee, reports or is about to report, verbally or in writing, **a violation or a suspected violation of a law** or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States **to a public body**, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362 (emphasis added).]

To establish a prima facie case under the WPA, a plaintiff must show that (1) the plaintiff or a person acting on his or her behalf reported a violation or suspected violation of law to a public body, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. *Debano-Griffin v Lake Co Bd of Comm'rs*, 493 Mich 167, 176; 828 NW2d 634 (2013). The issues here only involve the first prong.

A. A private attorney is not a “member” of a “public body” under the WPA.

As this Court has explained, the goal of statutory interpretation

is to give effect to the Legislature’s intent, focusing first on the statute’s plain language. In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. When a statute’s language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. [*Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (quotation marks and citations omitted).]

“Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.” *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

The WPA defines “public body” to mean all of the following:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.

(ii) An agency, board, commission, council, member, or employee of the legislative branch of state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body.

(v) A law enforcement agency or any member or employee of a law enforcement agency.

(vi) The judiciary and any member or employee of the judiciary. [MCL 15.361(d).]

The Court of Appeals relies on MCL 15.361(d)(iv) in concluding that all private attorneys are “public bod[ies]” under the WPA. Its reasoning for this conclusion is that the SBM is an “other body which is created by or local authority or which is primarily funded by or through state or local authority,” and, because every licensed attorney in Michigan must be a member of the SBM, MCL 600.916(1), all private attorneys are therefore “members” of an “other body.”

Because of this ruling, the Court of Appeals declined to consider McNeill-Marks’s alternative argument that, as an attorney, Gay is also an “officer of the court,” which makes him a “member . . . of the judiciary” under MCL 15.361(d)(vi). See **Exhibit 1** at 12 n 3.

Both arguments incorrectly interpret the WPA.

1. The SBM is not an “other body” under the WPA; it is a judicial agency.

In holding that the SBM is an “other body” under MCL 15.361(d)(iv), the Court of Appeals emphasized that it was a “public body corporate” under MCL 600.901, which provides:

The state bar of Michigan is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in this state. The members of the state bar of Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as “attorneys and counselors,” or “attorneys at law,” or “lawyers.” No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto.

The Court of Appeals further cites MCL 600.904, which provides that “[t]he supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members”

However, as the Court of Appeals’ citation to MCL 600.904 indicates, the SBM is controlled by this Court. It is, therefore, part of the judiciary. In *Falk v State Bar of Mich*, 411 Mich 63; 305 NW2d 201 (1981), this Court addressed the creation of the SBM. It explained that “[t]he integrated State Bar of Michigan was legislatively authorized by 1935 PA 58. Thereafter, this Court in cognizance of the legislation and pursuant to its own inherent power to regulate the practice of law in this state, entered an order organizing, and promulgating rules concerning, the integrated bar.” *Id.* at 88-89 (RYAN, J., concurring) (footnotes omitted).³

Although relying on an earlier iteration of the SBM’s foundational statute and an earlier state constitution, this Court held in another case that the SBM is “a governmental agency created for a specific purpose logically falling within the scope of the judiciary.” *State Bar of Mich v Lansing*, 361 Mich 185, 193; 105 NW2d 131 (1960).

The provisions of this act are such as to clearly indicate that it was the intent of the legislature to provide for the organization of an agency that should function pursuant to rules and regulations prescribed by the Supreme Court for the purpose of performing,

³ *Falk* is a seriatim decision that does not have a majority opinion. There is no dispute, however, among the justices regarding the background and creation of the SBM.

and assisting in the performance of functions that, in the final analysis, pertain to the judiciary. [*Id.* at 194.]

The State Bar Rules are in accord. See SBR 1 (“The State Bar of Michigan is . . . a public body corporate pursuant to powers of the Supreme Court over the bar of the state.”).

Because the SBM falls within the “judiciary” under MCL 15.361(d)(vi), it is not and cannot be any “other” body under MCL 15.361(d)(iv), and the Court of Appeals erred in holding otherwise.⁴ Because, however, the SBM is a *judicial* agency, it does not fall within any category of “public body” under MCL 15.361.

Where the Legislature intended to include agencies in the definition of “public body,” it did so. See MCL 15.361(d)(i)-(iii), (v). Its decision not to include, for instance, “agencies” “in the judicial branch of state government,” indicates that it intended to exclude such agencies. “Courts cannot assume that the Legislature inadvertently omitted from one statute the language that is placed in another statute, and then, on the basis of that assumption, apply what is not there.” *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993); see also *Hoste v Shanty Creek Mgmt.*, 459 Mich 561, 572 n 8; 592 NW2d 360 (1999) (citing the doctrine of *expressio unius est exclusio alterius* and explaining that “the express mention of some of the factors . . . implies the exclusion of the factors not mentioned”). The same analysis applies to provisions of the same statute. See also *Sweatt, infra* (“[A] word or phrase is given meaning by its context or setting.”). Accordingly, the SBM, as a judicial agency, is excluded from the definition of “public body” under the WPA.

For these reasons, communications to private attorneys are not protected under the WPA even if attorneys are “members” of the SBM for purposes of the WPA. They are not.

⁴ For this same reason, the Court of Appeals’ analysis of the SBM’s sources of authority and funding are misplaced.

2. Attorneys are not “members” of the SBM for purposes of the WPA.

With no explanation, the Court of Appeals concluded that McNeill-Marks’s attorney was a “member” of the SBM for purposes of the WPA. “Member” is not defined in the WPA. Accordingly, a dictionary supplies its common and ordinary meaning. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-57; 802 NW2d 281 (2011); see also MCL 8.3a. Where a word has a specialized legal meaning, it is appropriate to consult a legal dictionary. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 440; 716 NW2d 247 (2006).

Webster’s Universal College Dictionary (1997) sets forth a broad, general definition of “member” as “1. A person . . . belonging to or forming part of an organization” MidMichigan does not dispute that, in some sense of the word, private attorneys are members of the SBM. However, in the statutory context of MCL 15.361, it is evident that a member of the SBM is not a “member” under the WPA.

As this Court has explained:

“Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: ‘it is known from its associates,’ see Black’s Law Dictionary (6th ed.), p 1060. This doctrine stands for the principle [of interpretation] that a word or phrase is given meaning by its context or setting.” . . . Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. [*Sweatt v Dep’t of Corrections*, 468 Mich 172, 179-180; 661 NW2d 201 (2003) (citations omitted).]

In *Breighner v Mich High Sch Ath Ass’n*, 471 Mich 217, 232-33; 683 NW2d 639 (2004), this Court interpreted the language of Michigan’s Freedom of Information Act (“FOIA”), MCL 15.231 *et seq.*, which is substantially similar to the language of the WPA. Specifically, this Court considered the term “agency” as used in MCL 15.232(d)(iii), which defined “public body” under FOIA to include:

A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof. [Compare the WPA at MCL 15.361(d)(iii).]

This Court rejected the Court of Appeals' conclusion that "agency" included agents of the enumerated governmental entities, explaining:

Although the noun "agency" may be used to describe a business or legal relationship between parties, **it is wholly evident from the context of § 232(d)(iii) that this is not the sense in which that term is used.** Section 232(d)(iii) designates several distinct governmental units as public bodies, and proceeds to include in this definition any "agency" of such a governmental unit. In this specific context, the word "agency" clearly refers to a *unit or division of government* and not to the *relationship* between a principal and an agent. [*Breighner*, 471 Mich at 232 (italics in original, bold added).]

Breighner continued:

The Department of Labor and Economic Growth, for example, is a governmental "agency," but a real estate office hired to sell governmental property is *not* a governmental "agency." Indeed, it would defy logic (as well as the plain language of § 232[d](iii)) to conclude that the Legislature intended that any person or entity qualifying as an "agent" of one of the enumerated governmental bodies would be considered a "public body" for purposes of the FOIA. [*Breighner*, 471 Mich at 233 n 6.]

The same can be said here. While the SBM refers to licensed attorneys as its members and while such members "belong to or form part of" the SBM, the WPA does not envision that broad definition. "[I]t is wholly evident from the context of [MCL 15.361(d)(iv)] that this is not the sense in which the term is used." *Id.* at 232.

As *Webster's* alternatively defines it, "member" also means "6. a person belonging to a legislative body." Accord *Black's Law Dictionary* (Deluxe 9th ed.) ("1. *Parliamentary law*. One of the individuals of whom an organization or deliberative assembly consists, and who enjoys the full rights of participating in the organization – including the rights

of making, debating, and voting on motions – except to the extent that the organization reserves those rights to certain classes of membership.”). In the context of the WPA, this narrower definition is the correct one.

For instance, MCL 15.361(d)(ii) refers to a “member” “of the legislative branch of state government,” and MCL 15.361(d)(iii) refers to a “member” of decision-making units or divisions of government, e.g., a “county . . . governing body,” “municipal corporation,” or a “council.” See *Breighner*, 471 Mich at 232 (“Section 232(d)(iii) designates several distinct governmental units In this specific context, the word ‘agency’ clearly refers to a *unit or division of government*”). In context, “member” under the WPA means someone belonging to the relevant entity with some sort of authority or deliberative power. Accord MCL 15.361(d)(v) (referring to a “member . . . of a law enforcement agency”); MCL 15.361(d)(vi) (referring to a “member . . . of the judiciary”). Members of the SBM, simply by nature of their admission to the bar, do not have the requisite authority or deliberative power to be considered “members” under the WPA. They have no authority or deliberative power within the SBM.

Moreover, if the Court of Appeals is correct that any members of a statutorily-created “public body corporate” themselves qualify as “public bodies” under the WPA, not only would that include all licensed attorneys but also inactive members of the SBM, law student members, and even legal assistant and legal administrator affiliate members – all of whom the SBM terms “members.” See SBR 3 (e.g., “A legal assistant . . . may become an affiliate member of the State Bar of Michigan”). More troubling still, the Court of Appeals’ interpretation would also sweep in, for example, members of Presbyterian churches, see MCL 458.203; surviving Spanish War Veterans, see MCL 35.273; and members of the Michigan Horticultural

Society, whose “by-laws shall not exclude any citizen of Michigan from membership of the association . . . who shall subscribe and pay”, see MCL 453.305.

Just as the WPA does not envision extending whistleblower protection to reports of wrongdoing made to Presbyterians, legal secretaries, and blueberry farmers, it does not envision extending protection to private attorneys. The Court of Appeals’ holding to the contrary “def[ies] logic” and the language of the WPA. See *Breighner*, 471 Mich at 233 n 6.

3. An attorney is not a “member of the judiciary” by virtue of being an “officer of the court.”

McNeill-Marks has alternatively argued that, since attorneys are considered “officers of the court” under MCL 600.901, they constitute “public bodies” under MCL 15.361(d)(vi) because they are “members” of the judiciary. Not so.

In addition to common sense, *Black’s* definition of “officer of the court” makes clear that there is a substantive distinction between attorneys and judges, even though the term applies to both:

Typically, *officer of the court* refers to a judge, clerk, bailiff, sheriff, of the like, the term also applies to a lawyer, who is obligated to obey court rules and who owes a duty of candor to the court. [*Black’s*; see also *id.*, separately defining “judicial officer” as “[a] judge or magistrate” or “[a]ny officer of the court, such as a bailiff or court reporter.”]

Thus, while attorneys are “officers of the court,” they are not “member[s] . . . of the judiciary.” It is axiomatic that designation is reserved for judges. Accord *In re Chmura*, 461 Mich 517, 541; 608 NW2d 31 (2000). The application of the title “officer of the court” to attorneys simply imposes various duties, including candor to members of the judiciary. *Black’s, supra*; see also, generally, *Griev Adm’r v Fieger*, 476 Mich 231, 240-247; 719 NW2d 123 (2006).

Moreover, if McNeill-Marks were correct that all attorneys are members of the judiciary, every member of the Legislature and executive branch who also happens to be an

attorney – for instance, nearly the entire Office of the Attorney General – would be violating the Michigan Constitution, which provides:

No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const 1963, Art III, § 2.]

For these reasons, private attorneys are not “members . . . of the judiciary” under the WPA. Accordingly, this alternative argument fails as well.

4. An attorney cannot simultaneously be a “public body” and “a person acting on behalf of the employee” reporting to a “public body.”

As further support for the conclusion that an attorney is not a “public body,” the WPA provides that “[a]n employer shall not discharge . . . an employee . . . because the employee, **or a person acting on behalf of the employee**, reports or is about to report . . . a violation or suspected violation . . . **to a public body.**” MCL 15.362 (emphasis added).

It is an ancient concept in Michigan that an attorney is the agent of his or her client. *Detroit v Whittemore*, 27 Mich 281, 286 (1873) (“The employment of counsel does not differ in its incidents, or in the rules which govern it, from the employment of an agent in any other capacity or business.”); *Fletcher v Bd of Ed*, 323 Mich 343, 348-49; 35 NW2d 177 (1948). An attorney is, therefore, “a person acting on behalf of the employee,” where, as here, the employee is his client.

Under such circumstances, an attorney cannot simultaneously be a “public body” and a “person acting on behalf of the employee” to report to a “public body” – him or herself. That interpretation is nonsensical. However, it is necessary if the Court of Appeals is correct. Because “[i]t is a general rule of statutory construction that courts must construe statutes to avoid rendering words in the statute . . . nonsense,” *Booth Newspapers v Univ of Mich Bd of Regents*, 444 Mich 211, 228; 507 NW2d 422 (1993), the language of MCL 15.362 provides further

statutory evidence that MCL 15.361(d)'s definition of "public body" does not include all private attorneys.

B. Attorney-client communications do not constitute "reporting" under the WPA.

Attorney-client communications, which cannot be shared without the instruction or permission of the client, cannot constitute "report[ing] . . . to a public body" under the WPA. The verb "report" means "**12.** to make a charge against (a person), as to a superior." *Webster's, supra*. Applying that definition under the direction of *noscitur a sociis* indicates that "reporting" under the WPA must involve a statement to a person or entity that has the ability to take some sort of action (although they need not actually do so), such as making the information public. While a plaintiff does not have to be motivated to "inform the public on matters of public concern" under the WPA, *Whitman v City of Burton*, 493 Mich 303, 319; 831 NW2d 223 (2013), for their actions to constitute "reporting," the plaintiff must somehow announce the wrongdoing. Otherwise, they have not "report[ed]" anything. This interpretation is further reinforced by the fact that reporting must be made to a *public* body.

Returning to the agency relationship between attorney and client, "[i]t is a fundamental principle of hornbook agency law that an agency relationship arises only where the principal has the right to control the conduct of the agent with respect to matters entrusted to him." *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540, 558 n 18; 581 NW2d 707 (1998) (internal quotation marks and citation omitted). Moreover, within the attorney-client relationship, an attorney "shall not . . . reveal a confidence or secret of a client" unless the client consents. MRPC 1.6(b), (c)(1).

Where a person communicates suspected wrongdoing to an individual or entity that cannot take further action without the permission or instruction of the person, such as his or

her private attorney, that communication cannot constitute “reporting” under the WPA. Owing to the control of agency and the requirement of confidentiality, a client providing information to an attorney is similar to a person providing a note written in code to a law enforcement agency. If the public body cannot actually use the information, it has not been reported in any real sense. Accordingly, an attorney-client communication does not constitute a “report” to a public body under the WPA.

C. Michigan Courts have repeatedly rejected the application of WPA protection to communications with private attorneys.

Consistent with the foregoing analysis but without directly addressing the issue here, the Court of Appeals has previously rejected WPA claims involving communications to attorneys. See *Henry v City of Detroit*, 234 Mich App 405, 411; 594 NW2d 107 (1999) (“Even with a broad statutory construction . . . **we fail to see how this [deposition] testimony was a report to a public body.**”) (emphasis added); *Kauffman & Payton, PL v Nikkila*, 200 Mich App 250, 252-253, 257-258; 503 NW2d 728 (1993) (dismissing a WPA claim where the plaintiff sought counsel with private attorney and private attorney wrote letters to employee on the plaintiff’s behalf); accord *Vichinsky v Automobile Club of Mich*, unpublished opinion per curiam of the Court of Appeals, issued January 5, 1999 (Docket No. 203005) (holding that the plaintiff’s testimony at a civil deposition was insufficient to establish a WPA claim), **Exhibit 5**.

Notwithstanding MCR 7.215(J), the Court of Appeals did not even address, let alone follow the implicit holdings of *Henry* and *Kauffman* that communications to private attorneys do not constitute protected activity under the WPA. Accordingly, its conclusion below conflicts with those decisions.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT MCNEILL-MARKS HAD A BASIS TO ASSERT “A VIOLATION OR A SUSPECTED VIOLATION OF A LAW” UNDER THE WPA.

Under the WPA, McNeill-Marks’s report of the violation or suspected violation must have been made in good faith. *Truel v City of Dearborn*, 291 Mich App 125, 138; 804 NW2d 744 (2010). Where, as here, McNeill-Marks knew that she initiated communications with Fields and where Fields merely responded, “Hello, Tammy,” McNeill-Marks has not asserted a good faith basis for suspecting that Fields violated the PPO or a law.

The stated basis for the violation or suspected violation of the PPO in this case was that Fields’s actions constituted criminal “stalking” under MCL 750.411h and MCL 750.411i. MCL 750.411h(1) defines “stalking” as:

[A] willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.

The Court of Appeals focused on the harassment aspect of the definition, and, after citing MCL 750.411h(1)(c)’s definition of “harassment,” which refers to “repeated or continuing unconsented contact,” concluded that Fields’s actions constituted “unconsented contact.” That term is also defined in MCL 750.411h to include “any contact with another individual **that is initiated or continued without that individual’s consent** or in disregard of that individual’s expressed desire that the contact be avoided or discontinued.” MCL 750.411h(1)(e) (emphasis added).

Applying those definitions, the Court of Appeals concluded:

It is true that, to constitute stalking, there must be a “*willful* course of conduct[.]” MCL 750.411h(1)(d) (emphasis added). But even if Fields’s initial encounter with plaintiff in the hallway at [the

hospital] was not willful,^[5] and was instead accidental, her subsequent verbal *communication* with plaintiff constituted willful, unconsented contact under MCL 750.411h(1)(e); it was “contact with [plaintiff] that [wa]s initiated or continued without [plaintiff’s] consent or in disregard of [her] expressed desire that the contact be avoided or discontinued.” . . . Even if Fields could not have planned her contact with plaintiff or avoided such contact, after she saw plaintiff, Fields made a deliberate choice to speak to her, and such deliberation made the communication willful. Moreover, the record establishes that Fields did so in a decidedly willful tone—a tone indicating that she knew “she[had] gotten away with something she’s not supposed to do.” [**Exhibit 1** at 10 (emphasis in original).]

The Court of Appeals application is clearly erroneous, however, because it ignores a dispositive fact: **McNeill-Marks initiated contact with Fields**. As McNeill-Marks stated at her deposition:

I came out of the operating room door . . . in my full blue OR scrubs, I really . . . **I said “Hello”** because you’re trained to always speak to people. I didn’t even realize who she was or who the transporter was that was transporting her. **I got three steps down that hallway and she said, “Hello, Tammy,”** in one of those little voices she does, and my stomach sank. [**Exhibit 3** at 103:2-9.]

That was the extent of Fields’s communication with McNeill-Marks, *id.* at 105:6-8, and while Fields may have used a “sing-songy voice” that the Court of Appeals deemed a “decidedly willful tone,” Fields’s communication was neither “initiated or continued without [McNeill-Marks’s] consent.” To the contrary, because McNeill-Marks – even if inadvertently – initiated the contact, Fields’s two-word response cannot constitute the continuation of contact without McNeill-Marks’s consent. If someone says hello, it invites a response. Thus, the communication was initiated by McNeill-Marks and, to the extent, responding, “hello” even constitutes a continuation of communication, it was done with McNeill-Marks’s consent.

⁵ While the Court of Appeals only implicitly acknowledges that Fields did not willfully encounter McNeill-Marks, McNeill-Marks admitted at deposition that Fields – who had been transported to the hospital by ambulance and was being wheeled down a hall in a wheelchair at the time – could not have willfully encountered her, explaining “I don’t believe that . . . that anybody could necessarily -- that wouldn’t be a reasonable expectation, that she could plan to pass me in the hallway.” **Exhibit 3** at 105:3-5.

Accordingly, McNeill-Marks did not have a good faith basis to suspect that Fields violated the PPO or a law are required under the WPA.

RELIEF SOUGHT

MidMichigan requests that this Court grant its application, reverse the Court of Appeals' decision below, and reinstate the trial court's order granting summary disposition in favor of MidMichigan. Because attorneys are not "public bodies," because a confidential communication with an attorney does not constitute "report[ing]," and because McNeill-Marks lacked a good faith basis to believe that a violation or suspected violation of a law occurred, she has failed to establish a prima facie case under the WPA.⁶ The Court of Appeals erred in holding otherwise, and, if uncorrected, its published opinion will have wide-ranging consequences never intended by the Legislature.

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⁶ McNeill-Marks has also argued below that she was "about to" report a violation to the trial court. While that argument also fails as a matter of law because McNeill-Marks has failed to establish it "by clear and convincing evidence," MCL 15.363(4), the Court of Appeals did not address this argument, and MidMichigan does not seek leave to address it.

If this Court believes briefing on this issue would be helpful, however, MidMichigan will provide it.